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October 2, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

Dear Chairman Leahy:

The Office of the Director of National Intelligence ("DNI") argues that the Free Flow of Information Act ("the Act") would "make it very difficult to enforce criminal laws involving the unauthorized disclosure of classified information." We submit this response on behalf of the Newspaper Association of America, which is coordinating a coalition of more than 50 media and journalist organizations seeking enactment of the Act.

DNI overlooks that information is substantially overclassified, for reasons unrelated to national security:

- According to the latest report issued by Information Security Oversight Office (ISSO), the agency charged with keeping track of security classifications, 15.6 million documents – not pages – were classified in 2004.

- According to Rodney P. McDaniel, Executive Secretary of the National Security Council under President Reagan, only 10 percent of classification was for "legitimate protection of secrets." 1997 Moynihan Commission Report, at 36.

- Disclosure of classified information to journalists has informed the public about the torture of Iraqi prisoners at Abu Ghraib; fraud and abuse in the defense industry; the exposure of Kentucky workers to unsafe amounts of plutonium and uranium; and lapses in security creating vulnerability to espionage, as in the case of former CIA agent Edward Lee Howard.

Yet under DNI's view, the identification of confidential sources should be required even if the leaked information was classified improperly, did not harm national security, and exposed government wrongdoing or corruption.

Indeed, contrary to DNI's claim, secrecy has often harmed the interests of the United States. Based on the findings of the 9/11 Commission, one classification expert has observed that "[i]f there had been 'publicity' about the arrest of one of the conspirators [Zacharias Moussaoui] at a Minnesota flight school, the planners [of 9/11] might have called off the hijackings." Tom Blanton, *Editorial, Are We Safer . . . In the Dark*, USA Today, Mar. 13, 2007. Likewise, in 1999, a classified report concluded that if the U.S. toppled Saddam Hussein, there could be a "period of widespread bloodshed in which various factions seek to eliminate their

enemies" – even if the U.S. committed 400,000 troops to the task. *Dessert Crossing Seminar – After Action Report Briefing* (July 22, 1999). Had this information been public before the invasion of Iraq, Congress would have been in a position to force a re-examination of the invasion plans or to ensure that enough troops were committed to get the job done.

Second, DNI also exaggerates the Act's burden of proof. According to DNI, the Act's requirement – that the government demonstrate national-security harm by a "preponderance of the evidence" – imposes "an extraordinary burden." Yet the "preponderance" standard requires only a showing that the harm is "more likely than not." *See, e.g.*, *Fadiga v. Att'y Gen.*, 488 F.3d 142 (3d Cir. 2007). At least a dozen states' shield laws impose an even higher burden, such as "clear and convincing evidence."

Further, when reviewing classification decisions, courts give "deference to reasoned and detailed [government] explanations of that classification decision," and seek merely to ensure that "the reasons for classification are rational and plausible ones." *McGehee v. Casey*, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983). Even under a balancing test courts rule for the government when it invokes legitimate concern for national security. *See, e.g.*, *N.Y. Times v. Gonzales*, 459 F.3d 160, 170 (2d Cir. 2006) (applying a balancing test and holding that the government could subpoena the phone records of a newspaper who was informed that the government planned to freeze the assets of and search the premises of two foundations suspected of financing terrorism); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1178 (D.C. Cir. 2006) (Tatel, J., concurring in the judgment) (applying a balancing test and held "the public interest in punishing the wrongdoers-and deterring future leaks-outweighs any burden on newsgathering, and no privilege covers the communication."); *Tenet v. Doe*, 544 U.S. 1 (2005) (dismissing suit against government due to "state secrets privilege").

Third, the Act will not require the government to disclose additional information. DNI claims that to demonstrate national-security harm, the government will be forced to "reveal[] still more sensitive and even classified information." But the Act does not require this information to be disclosed in open court. *In camera* review is a staple of court cases that relate to national security, such as the Judith Miller case, litigation over the government's surveillance program, and the government's prosecution of terrorism suspects.

Thank you for the opportunity to present our views.

Respectfully submitted,

/s/ Stephen P. Anthony
Stephen P. Anthony
Counsel for the Newspaper Association of America

cc: The Honorable Arlen Specter
Ranking Member
Members, Committee on the Judiciary